No. 81-110

Office-Supreme Court, U.S.
FILED
JUL 18 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

GEORGE E. TOPPING, JAMES M. BURBAGE, ROBERT A. MILLER, AND DENNIS McCABE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the

United States Court of Appeals
for the Fourth Circuit

MERLIN H. STARING
JOHN H. WEST, III
Ober, Grimes & Shriver
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 833-2266
Attorneys for Petitioners

QUESTION PRESENTED

The question presented is whether the crew members of a commercial fishing vessel, who received their compensation in the form of crew shares based upon the vessel's earnings, are foreclosed as a matter of law from recovering, from the owner of another vessel, anticipated future earnings of which they were deprived as a result of the loss of their fishing equipment caused by the negligence of that other vessel.

TABLE OF CONTENTS

	Page
Question Presented	ii
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
Background of the Question	4
The Conflicts	8
Importance of the Question	17
Conclusion	18

APPENDICES

A. Opinion of District Court Granting Respondent's Motion for Summary Judgment	A-1
B. Opinion of the Court of Appeals	B-1

TABLE OF AUTHORITIES CITED

Cases **Page**

Borcich v. Ancich, 191 F.2d 392 (9th Cir. 1951), cert. denied 342 U.S. 905, rehearing denied 342 U.S. 934 7
Carbone v. Ursich, 209 F.2d 178 (9th Cir. 1953) 4, 5
Casado v. Schooner Pilgrim, Inc., 171 F. Supp. 78 (D. Mass. 1959) 6
Federal Commerce and Nav. Co. v. M/V MARATHONIAN, 392 F. Supp. 908 (S.D.N.Y. 1975), aff'd 528 F.2d 907 (2d Cir. 1975) 12
Guarrasi v. Panama Canal Company, 271 F. Supp. 678 (D. C.Z. 1967) 8
Henderson v. Arundel Corporation, 262 F. Supp. 152 (D.Md. 1966) 4
Henderson v. Arundel Corporation, 384 F. 2d 998 (4th Cir. 1967) 4
Marine Floridian Limitation Proceedings, 1980 A.M.C. 974 (E.D. Va. 1980) 16
Marine Navigation Sulphur Carriers, Inc. v. Lone Star Industries, Inc., 638 F.2d 700 (4th Cir. 1981) ... 16
Petition of Kinsman Transit Company, 338 F.2d 708 (2d Cir. 1964) 9
Petition of Kinsman Transit Company, 388 F.2d 821 (2d Cir. 1968) 8
Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927) 4, 5
Union Oil Company v. Oppen, 501 F. 2d 558 (9th Cir. 1974) 10
Venore Transportation Co. v. M/V STRUMA, 583 F. 2d 708 (4th Cir. 1978) 5

Statutes

Public Vessels Act, 46 U.S.C. §§781-790 2
Suits in Admiralty Act, 46 U.S.C. §§741-752 3

Other Authorities

Page

1 Harper and James, The Law of Torts, 505-10 (1956) 9
James, Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal, 25 Vand. L. Rev. 42 (1972) 15
Paulsen, Provable Damages in Collision Cases, 51 Tul. L. Rev. 1047, 1062-63 (1977) 14
Prosser, The Law of Torts, 964 (3d ed. 1964) 9
Note, Negligent Interference with Contract: Knowledge as a Standard for Recovery, 63 Va. L. Rev. 813, 818-829 (1977) 15

No. _____

IN THE

Supreme Court of the United States

October Term, 1981

GEORGE E. TOPPING, JAMES M. BURBAGE, ROBERT A. MILLER, AND DENNIS McCABE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the

United States Court of Appeals
for the Fourth Circuit

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on April 15, 1981.

OPINIONS BELOW

The memorandum order and opinion of Judge John A. MacKenzie, Judge of the United States District Court for the Eastern District of Virginia, Norfolk Division, are not reported, but are set forth in the Appendix at pages A-1 through A-3, *infra.* The opinion and judgment of the United States Court of Appeals for the Fourth Circuit are not reported, but are set forth in the Appendix at pages B-1 and B-2, *infra.*

JURISDICTION

On April 15, 1981, the United States Court of Appeals for the Fourth Circuit entered its judgment affirming the decision of the United States District Court for the Eastern District of Virginia, Norfolk Division, granting the respondent's motion for summary judgment. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Public Vessels Act, 46 U.S.C. §§781-790:

46 U.S.C. §781:

> A libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States . . .: *Provided*, That the cause of action arose after the 6th day of April, 1920.

46 U.S.C. §782:

> Such suit shall be brought in the district court of the United States for the district in which the vessel . . . charged with creating the liability is found within the United States. . . . Such suits shall be subject to and proceed in accordance with the provisions of chapter 20 of this title [the Suits in Admiralty Act] or any amendment thereof, insofar as the same are not inconsistent herewith. . . .

46 U.S.C. §789:

> The United States shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels.

Suits in Admiralty Act, 46 U.S.C. §§741-752:

46 U.S.C. §742:

> In cases where if [a vessel owned or operated by the United States] were privately owned or operated, . . . a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States. . . . Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel . . . charged with liability is found.

46 U.S.C. §743:

> Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. . . .

STATEMENT OF THE CASE

The petitioners were crewmembers of a commercial fishing vessel, receiving their compensation in the form of crew shares computed for each trip on the basis of an agreed percentage of the value of the catch landed by the vessel on that trip. They brought this action against the United States Government on November 13, 1979, under the Public Vessels Act, 46 U.S.C. §§781-790, and the Suits in Admiralty Act, 46 U.S.C. §§741-752, as an admiralty or maritime claim for the loss of anticipated wages caused by the negligent destruction, by a United States Government vessel or vessels, of fishing gear employed and needed by the fishing vessel and its crew in their fishing operations. The claim of the crewmen alleged that this loss of their vessel's gear necessitated the suspension of their fishing operations and caused them to lose substantial amounts of income which they could otherwise have expected to receive.

After extensive discovery, the Government moved for summary judgment on the basis that, as a matter of law in the Fourth Circuit, one who unintentionally but negligently damages the property of another is not liable to third persons who

may suffer economic loss through the resulting inability of the owner of the damaged property to meet contractual commitments to those third persons.

On July 21, 1980, the district court issued a Memorandum Order granting the Government's motion for summary judgment on the basis asserted, and judgment was entered accordingly (Appendix, pages A-1 through A-3). In thus disposing of the matter by summary judgment, the district court relied upon the general rule of *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). It declined to recognize an exception to that rule in the circumstances of this case, or to apply a "special rule" for fishermen as had in one instance been done by the Court of Appeals for the Ninth Circuit.[1]

On April 15, 1981, the Court of Appeals affirmed the decision of the district court, agreeing that *Robins Dry Dock* and a prior decision in the Fourth Circuit[2] required dismissal of the petitioners' claims (Appendix, pages B-1, B-2).

REASONS FOR GRANTING THE WRIT

The Writ of Certiorari should be granted because the Court of Appeals has:

1. Rendered a decision in this case in conflict with decisions on the same matter by two other federal courts of appeals, and

2. Decided an important question of federal law which has not been, but should be, settled by this Court.

Background of the Question

The judgment of the court below is predicated upon the general rule enunciated by this Court in 1927 in *Robins Dry Dock* – that "a tort to the person or property of one man does

---

1. *Carbone v. Ursich*, 209 F.2d 178 (9th Cir. 1953).

2. *Henderson v. Arundel Corp.*, 384 F.2d 998 (4th Cir. 1967), *aff'g* 262 F.Supp. 152 (D. Md. 1966).

not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong."[3] The Court of Appeals had in 1967 adhered to the *Robins Dry Dock* rule in its summary affirmance of the decision of the district court in *Henderson v. Arundel Corporation*,[4] applying it there to foreclose crew members of a dredge from seeking to recover lost wages from a ship which had collided with the dredge on which they were employed. In *Henderson*, the district court had considered the possible creation of an exception to the *Robins Dry Dock* rule for application in the case of those seamen (as had been done in another court in a case involving fishermen[5]) – but had rejected such a resolution.

The Court of Appeals had in 1978 again acknowledged the continued vitality of the *Robins Dry Dock* rule in *Venore Transportation Co. v. M/V STRUMA*[6] – distinguishing the facts in that case from those in *Robins Dry Dock*, but citing *Henderson* as embodying a situation of a type to which *Robins Dry Dock* had in the past been found to be applicable. On the ground that the rule of *Robins Dry Dock* continues to be controlling in the Fourth Circuit, and that the facts of this case bring it within that rule, it has been concluded that the crewmen petitioners are foreclosed from recovery on their claims.

By 1966-1967, when *Henderson* came before the courts of the Fourth Circuit, cases involving the application of the *Robins Dry Dock* rule to fishermen's claims for lost crew shares or wages in similar situations had come before the courts of other jurisdictions. Notable among these was *Carbone v. Ursich*.[7] In that case, it was held that the *Robins Dry Dock* rule did not foreclose the recovery by fishermen of anticipated crew or "lay" shares lost through the negligence of a third-party tortfeasor. In reaching this result, it was concluded that this Court, in deciding

---

3. 275 U.S. at 309.

4. 262 F.Supp. 152 (D.Md. 1966), *aff'd mem.* 384 F.2d 998 (4th Cir. 1967).

5. *Supra* note 1.

6. 583 F.2d 708 (4th Cir. 1978).

7. *Supra* note 1.

Robins Dry Dock (which involved a claim by a time charterer against a dry dock for loss of use of a vessel), did not have within its contemplation the "special situation" of fishermen –

> . . . who . . . had long been recognized as beneficiaries under a special rule which made the wrongdoer liable not only for the damage done to the fishing vessel, but liable for the losses of the fishermen as well. This long recognized rule is no doubt a manifestation of the familiar principle that seamen are the favorites of admiralty and their economic interests entitled to the fullest possible legal protection. These considerations have given rise to a special right comparable to that of a master to sue for the loss of services of his servant, or the right of a husband or father to sue for the loss of services of wife or child.[8]

However valid and defensible its ultimate result might have been, it would appear that the court which decided *Carbone v. Ursich* did fishermen and seamen on the East Coast of the United States no favor by predicating its decision in part upon a "special rule" for fishermen as "beneficiaries," or by noting that such a rule had its probable genesis in "the familiar principle that seamen are the favorites of admiralty." In 1959, in *Casado v. Schooner Pilgrim, Inc.*,[9] crewmembers of a vessel attempted to recover anticipated wages lost through the negligence of a ship which collided with theirs. Their suits were dismissed – and, in the process, Judge Aldrich took note of *Carbone v. Ursich* in the following manner:

> The only way to permit recovery here would be to say frankly, as has been done by the Ninth Circuit, that a "special rule" obtains for fishermen. *Carbone v. Ursich* . . . [citations omitted]. With all respect to that learned court, I do not believe that to say "seamen are the favorites of admiralty" should be to create

---

8. Carbone v. Ursich, *supra* note 1, at 182.
9. 171 F.Supp. 78 (D. Mass. 1959).

> a corresponding class of villains on whom to impose a new type of liability. . . . I believe the fundamental principles of liability should be the same, whether employees are fishermen, or factorymen.[10]

It was at this developmental juncture that *Henderson* was decided by the U.S. District Court for the District of Maryland in 1966. The defendant vessel owner relied, in its defense against crewmembers' claims for loss of anticipated wages, upon *Robins Dry Dock*; upon *Borcich v. Ancich*[11] (although admittedly reversed in *Carbone v. Ursich*); and upon *Casado v. Schooner Pilgrim* – among other authorities. The crewmen, of course, relied upon *Carbone v. Ursich*, expressly invoking the status of seamen as "favorites of the admiralty" and their entitlement to membership in the class of "beneficiaries under a special rule" which had been postulated by the court in that case.[12]

The trial court in *Henderson* characterized *Carbone* and *Casado* as the "two leading cases in this field," and stated:

> These two cases ably and succinctly review the authorities for and against creating a special rule applicable only to fishermen. There is no need for and nothing to be gained by a lengthy discussion by this court of the authorities in this field.[13]

It then summarized the reasoning and authorities advanced by the Court of Appeals for the Ninth Circuit in both its earlier holding in *Borcich v. Ancich* and its later reversal of itself in *Carbone*, then stated that it was "in complete accord with the statement of Judge Bailey Aldrich in the *Casado* case" and quoted that statement in full, with its colorful "favorites"/"villains" and "fishermen"/"factorymen" comparisons.[14]

---

10. *Supra* note 9, at 80.

11. 191 F.2d 392 (9th Cir. 1951), *cert. denied* 342 U.S. 905, rehearing denied 342 U.S. 934.

12. Henderson, *supra* note 4, 262 F.Supp. at 159.

13. *Ibid.*

14. Henderson, *supra* note 4, 262 F.Supp. at 160.

It was at this juncture that the Court of Appeals below adopted what is now said to be the controlling rule in the Fourth Circuit, through summary affirmance.[15]

Also in 1967, the U.S. District Court for the Canal Zone had occasion to consider a similar problem in *Guarrasi v. Panama Canal Company*.[16] That court noted the then-recent decision in *Henderson* as being "very much in point" – and it, too, seized upon Judge Aldrich's language in *Casado* and quoted the comments critical of the Ninth Circuit decision in *Carbone*. The claim by fishermen for anticipated crew shares was dismissed accordingly, on the basis of the *Robins Dry Dock* rule.

Thus far in this discussion, it would seem that the authorities weigh heavily in favor of the respondent and of the correctness of the decision below – except for the 1953 *Carbone* case, which appears to have been rather critically regarded by other courts as an anomaly. The *Robins Dry Dock* rule would appear to have been regarded up to this time – by most courts, at least – as an authoritative and controlling decision which was welcomed as a convenient means of disposing of a variety of troublesome cases by turning them away soon after they entered the courthouse door.

The Conflicts

In 1968, however, the broad and ready application of the *Robins Dry Dock* rule began to narrow. The Court of Appeals for the Second Circuit was in that year confronted for the second time, in *Petition of Kinsman Transit Company* ["*Kinsman II*"][17] with a tort-liability situation involving damages sustained by a large number of parties, in a variety of circumstances, as a result of a collision of two ships with each other and with a bridge. The facts and the legal implications of the incident were extremely complex, and had been set forth in detail and explored in an earlier decision by the same court in

15. Henderson, *supra* note 4.
16. 271 F.Supp. 678 (D.C.Z. 1967).
17. 388 F.2d 821 (2d Cir. 1968).

1964.[18] Both of these decisions are of interest for present purposes, and they will be discussed further below – but attention is at this point invited to *Kinsman II*.

In *Kinsman II*, Judge Kaufman was presented with claims by two commercial firms for losses in the form of extraordinary business expenses which had been incurred by virtue of the negligently-caused collisions and the resulting navigational obstructions. The court below had found that these damages were caused through negligent but unintentional and unknowing interference with contractual relations, and had denied recovery on the authority of *Robins Dry Dock*. On appeal, however, Circuit Judge Kaufman expressly rejected *Robins Dry Dock* as a basis for decision, stating:

> We do not encounter difficulty with [the lower court's] analysis because it lacks some support in the case law; instead, we hesitate to accept the "negligent interference with contract" doctrine in the absence of satisfactory reasons for differentiating contractual rights from other interests which the law protects. The argument, frequently heard, that to allow recovery in such instances would impose a penalty far out of proportion to the defendant's fault or open the field to collusive claims and increased litigation, see Prosser, The Law of Torts, 964 (3d ed. 1964), which are the spectres commonly raised whenever the law extends its protection. [Sic.] Here, as elsewhere, the answer must be that courts have some expertise in performing their almost daily task of distinguishing the honest from the collusive or fraudulent claim. And "[i]f the result is out of all proportion to the defendant's fault, it can be no less out of proportion to the plaintiff's entire innocence." Id at 296. Moreover, several cases often cited as illustrations of the application of the "negligent interference with contract" doctrine have been convincingly explained in terms of other, more common tort principles. See 1 Harper and James, The Law of Torts, 505-10 (1956). Indeed,

18. *Petition of Kinsman Transit Company* ["*Kinsman I*"], 338 F.2d 708 (2d Cir. 1964).

> Professors Harper and James suggest that the application of the doctrine is wholly artificial in most instances. Id at 501. We therefore prefer to leave the rock-strewn path of "negligent interference with contract" for more familiar tort terrain.[19]

Judge Kaufman went on to hold that the plaintiffs could not recover on their claims, but because they were too *remote* or *indirect* a consequence of the defendants' negligence – not on the basis of a simplistic application of the rule of *Robins Dry Dock*. In noting that the connection between the defendants' negligence and the claimants' damages was "too tenuous and remote to permit recovery," however, he employed Mr. Justice Holmes' observation in *Robins Dry Dock*: "The law does not spread its protection so far."[20]

With the *Robins Dry Dock* rule coming under more frequent and increasingly close scrutiny, at least in its broad or general application to cases not directly within the circumstances and terms of its holding, another case involving claims by fishermen came before the Court of Appeals for the Ninth Circuit – *Union Oil Company v. Oppen*.[21] That case involved the tortious pollution of the Santa Barbara Channel by oil, and claims by commercial fishermen for loss of profits due to reduction in the commercial fishing potential of the affected waters – (a far more speculative and remote type of damage, incidentally, than that asserted by the crewmen petitioners in the present action).

In the *Oppen* case, the Ninth Circuit court conducted a far more basic and comprehensive analysis of the law of recovery for negligently-caused economic loss than it had done 21 years before in *Carbone* – and it reached the same ultimate result. It found, in effect, that the actions of the fishermen on their claims were not barred by the *Robins Dry Dock* rule. In reaching that conclusion, the court took note of its prior holding in *Carbone* – and of its refusal to apply the *Robins Dry Dock* rule

---

19. *Supra* note 17, at 823-824.
20. *Supra* note 17, at 824-825.
21. 501 F.2d 558 (9th Cir. 1974).

in the circumstances of that case – as but one of many types of exceptions which had over the years been carved out of the general rule against recovery for negligently-caused economic loss.[22] In deciding that the fishermen claimants in *Oppen* were not to be foreclosed from pursuing their claims in due course, the court said:

> All that we do here is to permit the plaintiffs to attempt to prove their case, and to reject the idea urged upon us by the defendants that a barrier to such an effort exists in the form of the rule that negligent interference with an economic advantage is not actionable.[23]

It is significant that, in reaching this result for the fishermen claimants, the court did not rely upon any "special rule" for fishermen, or upon their status as "beneficiaries" of the principle that "seamen are the favorites of admiralty." What the court *did* rely upon were its conclusions that (1) the defendants owed a duty to the plaintiffs to refrain from negligent conduct in the defendants' operations, (2) which conduct reasonably and foreseeably could have been anticipated to cause the damage which it did cause, (3) thus causing injury to the plaintiffs' business.[24]

In pointing out at the conclusion of its opinion in *Oppen* that its holding was not opening the door to claims that might be asserted for every decline in general commercial activity of every business in the area of the pollution damage, the court characterized the fishermen plaintiffs' more direct involvement in the matter in these terms:

> The plaintiffs in the present action lawfully and directly make use of a resource of the sea, *viz.* its fish, in the ordinary course of their business. This type of use is entitled to protection from negligent conduct by the defendants in their drilling operations. Both the plaintiffs and defendants conduct their business

22. *Id.* at 567.
23. *Id.* at 570.
24. *Id.* at 568.

> operations away from land and in, on and under the sea. Both must carry on their commercial enterprises in a reasonably prudent manner. Neither should be permitted negligently to inflict commercial injury on the other. We decide no more than this.[25]

Within a year after the *Oppen* decision in the Ninth Circuit, the U.S. District Court for the Southern District of New York, and soon thereafter the Court of Appeals for the Second Circuit, had occasion in *Federal Commerce and Nav. Co. v. M/V MARATHONIAN*[26] to consider the status and posture of the *Robins Dry Dock* rule in its application to a fact situation essentially identical to that which gave rise to the rule in 1927 – a claim by the time charterer of a vessel, against a third-party tortfeasor, for resulting loss of the use of the vessel by the charterer. The trial court considered itself bound by *Robins Dry Dock*, and accordingly dismissed the plaintiff's claim on motion. In the process, however, it recognized "that the rule enunciated in *Robins* and the broader concept that negligent interference with the performance of a contract does not state a cognizable claim have been the subject of severe criticism by many commentators."[27] The court went on to cite, and sometimes to quote at length from, an impressive variety of treatises and commentators, then stated:

> Indeed, were this Court now free to write upon a *tabula rasa* and not constrained by the weight of precedent, we would reject the negligent interference with contract doctrine in favor of a negligence-causation-forseeability analysis, such as was adopted by Chief Judge Kaufman in Petition of Kinsman Transit Co., 388 F.2d 821, 823-824 (2 Cir. 1968) [*Kinsman II*].[28]

In concluding its opinion, the trial court stated:

---

25. *Id.* at 570-571.

26. 392 F.Supp. 908 (S.D.N.Y. 1975), *aff'd* 528 F.2d 907 (2d Cir. 1975).

27. *Supra* note 26, 392 F.Supp., at 912.

28. *Id.* at 913.

> In the instant case, however[,] we feel bound by the Supreme Court's decision in *Robins*. We believe that the *Robins* decision must be adhered to by the lower federal courts, *at least in instances involving the factual contours of that case, namely the negligent interference with a time charterer's contract rights by third parties*, until such time as the Supreme Court directs otherwise.[29] [Emphasis supplied.]

On appeal of *M/V MARATHONIAN*, the Court of Appeals for the Second Circuit noted that the trial court "in a considered and thorough opinion reluctantly dismissed the action as not sustainable in the light of *Robins Dry Dock & Repair Co. v. Flint*" – and affirmed that judgment.[30] The court acknowledged that the appellant's contention "that *Robins* is unsound, has been eroded and should not be followed" had some substance, "for the basis for denial of relief to the time charterer in *Robins* has come under strong scholarly criticism" – citations omitted.[31] Finding no indication that the *Robins* rule had been abandoned or was in the process of being abandoned by this Court, however, the appellate court stated:

> The *Robins* rule appears to be based on a contract theory, denying relief to one injured by negligent interference with contract, although an effort is also made by appellee to justify the rule on the basis of remoteness of injury. If free to do so, we might question whether at least the damage to the principal time charterer is not so reasonably to be expected as to justify recovery. See *Petition of Kinsman Transit Co.*, 388 F.2d 821, 823-824 (2d Cir. 1968). But there are arguments to the contrary, such as the difficulty in drawing the line in a field where successive subcharters are not uncommon and rapid and wide fluctuations of rates of charter hire not unknown.

---

29. *Id.* at 915.
30. *Supra* note 26, 528 F.2d, at 907.
31. *Id.* at 907-908.

> In any case, "the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom." [Citation omitted.][32]

In 1978, in *Venore Transportation Co. v. M/V STRUMA*,[33] the Court of Appeals for the Fourth Circuit again considered the *Robins* rule, its continued viability, and its exact extent. It had before it a claim by the time charterer of a vessel against a third-party tortfeasor for the loss of use of the chartered vessel after collision. This claim had been turned away by the district court on a grant of summary judgment for the defendant – based, of course, upon *Robins Dry Dock*. The Court of Appeals, however, examined the matter in detail and concluded that the rule of the *Robins* case was inapplicable, and that recovery of the charter hire should be allowed, because there had been no suspension of the charterer's payment of charter hire while the vessel was being repaired.[34]

In distinguishing the *Venore Transportation* situation from that of the *Robins Dry Dock* case, the Fourth Circuit noted that the damage claimed in *Robins Dry Dock* was essentially a loss of anticipated profits; and it described the principle of *Robins Dry Dock* as follows:

> It is essentially a principle of disallowance of damages because of remoteness, and because of the concern that the number and the amount of potential claims in a given instance may be staggering.[35]

Further in its opinion, the Court of Appeals stated:

> The principle of *Robins Dry Dock* is perfectly defensible, if pragmatic considerations require the foreclosure of remote damage claims.[2]
>
> [Footnote 2. *See* Paulsen, Provable Damages in Collision Cases, 51 Tul. L. Rev. 1047, 1062-63 (1977);

32. *Id.* at 908.
33. *Supra* note 6.
34. *Id.* at 709
35. *Id.* at 710.

James, Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal, 25 Vand. L.Rev. 42 (1972); *and see* Note, Negligent Interference with Contract: Knowledge as a Standard for Recovery, 63 Va. L.Rev. 813, 818-829 (1977).[36]

Continuing, in the context of that case, the Court of Appeals stated:

> The tort feasor, having paid the owner for its loss of use of the vessel, should not be required to pay additionally for the time charterer's loss of anticipated profits. *A pragmatic approach would require that the offending vessel pay for loss of use of the damaged vessel once, but no more. Unless the offending vessel is required to pay for the loss of use of the OSWEGO LIBERTY in this case, however, it would never be required to pay at all.* The owner lost no charter hire. It could not claim a loss it had not suffered, and it did not do so. . . . *There is nothing remote about these damages*; the only objection is that they were suffered by the time charterer rather than by the owner.[37] [Emphasis supplied.]

And further:

> We do not intend, however, to suggest that the time charterer is entitled to lost profits. That kind of claim is foreclosed by *Robins Dry Dock*.
>
> * * *
>
> In *Robins Dry Dock*, Mr. Justice Holmes wrote broadly, as he customarily did, but there is no inconsistency in our holding and that of the Supreme Court in *Robins Dry Dock*. Nor do we enlarge in any way the types of damages which have been traditionally recoverable, nor the offending vessel's obligation of recompense.[38]

---

36. *Ibid.*
37. *Id.* at 710-711.
38. *Id.* at 711.

In *Venore Transportation*, therefore, the Court of Appeals below came to the view, as have a number of other courts in various contexts, that the broadly-stated rule of *Robins Dry Dock* need not be rigidly applied to foreclose a claimant simply on a prima facie showing that the loss upon which his claim is based occurred through an interference with a contract right or relationship, rather than through some direct damage occasioned by the negligent incident giving rise to the claim. The crewmen petitioners here asked of the Fourth Circuit court no more than a considered examination of their situation, and of its essence, comparable to that court's analysis of the situation of the time charterer in *Venore Transportation* – submitting that it was not necessary that that court's views of *Robins Dry Dock* and its rule, as expressed in *Venore Transportation*, be challenged in order to achieve that result.

At the time it considered the instant case on appeal, the Fourth Circuit court had recently considered another case which was factually parallel in many respects to the *Kinsman II* case in the Second Circuit – *Marine Navigation Sulphur Carriers, Inc. v. Lone Star Industries, Inc.*[39] Like *Kinsman II*, the *Marine Navigation* case had involved a multiplicity of claims for various indirect and consequential damages arising from a ship-bridge collision; and like *Kinsman II*, these claims were dismissed by the trial court on considerations of proximate cause and remoteness.[40] In affirming the district court decision, the Court of Appeals for the Fourth Circuit expressly agreed with the district court's reliance "upon the general principle applied in *Kinsman* as the appropriate rule of decision."[41] Since the court in *Kinsman* had declined a simplistic application of the *Robins Dry Dock* rule as a basis for its decision, but relied instead upon conventional tort principles of remoteness and indirect consequences, the crewmen petitioners here sought at oral argument to receive from the Fourth Circuit court a comparable opportunity to have their claims similarly considered, rather than being summarily dismissed on the basis of the *Robins Dry Dock* rule.

---

39. 638 F.2d 700 (4th Cir. 1981).

40. Marine Floridian Limitation Proceedings, 1980 A.M.C. 974 (E.D.Va. 1980).

41. *Supra* note 39, at 702.

Despite the recent flexibility it had demonstrated in *Venore Transportation* and *Marine Navigation*, however, the Fourth Circuit court elected in this case to rely flatly upon the *Robins Dry Dock* rule. In so doing, it reached, for these crewmen petitioners, a result which was at variance with the result which similarly situated crewmen could reasonably expect from the courts of the Ninth Circuit, under the principles of the *Oppen* case and its developmental progenitors – or from the courts of the Second Circuit, under the principles of *Kinsman II*. In either the Second or the Ninth Circuits, it seems clear that the petitioners, and other claimants similarly situated, would be accorded a hearing of their claims on their merits – rather than being nonsuited at the outset by a facile application of the rule which Mr. Justice Holmes enunciated, in the quite-different factual context of *Robins Dry Dock*, as being "a general rule, at least."[42]

Importance of the Question

The numbers of reported court cases involving crewmen of commercial fishing vessels who serve on a crew-share basis is perhaps not large. Service on such a basis, however, is a common feature of a large industry, on all coasts of the United States. The potential for tangible damage to the interests and earnings of such crewmen, through the negligent actions of third parties, is commensurately substantial and widespread.

Not in every instance are such damages sufficiently large, or the means of minimizing them through alternative employment so unavailable, as to make it economically feasible to pursue a claim past the initial hurdles, as has been done in the instant case. In the aggregate, however, the large numbers of persons who are exposed to the risk of damage without remedy present a legal and human problem which merits the concerned attention and consideration of this Court.

It is likewise a legitimate concern of this Court that even relatively small claimants, of any class, may be accorded or may

---

42. *Supra* note 3, at 309.

be denied a remedy, within the single system of the federal courts, based upon their chance location in one or another geographical area of the United States – or, in the case of commercial fishermen such as these petitioners, based upon the chance that they may be engaged in their valuable and respectable labors in the waters of one coast or another of the United States.

Upon all of the foregoing considerations, it is respectfully submitted that the question here presented has an importance beyond the circumstances or magnitude of this or any other individual case – and that the problem presented focuses upon an anomaly in the law of the United States which merits consideration by this Court.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should grant a Writ of Certiorari to review the decision of the Court of Appeals.

Respectfully submitted,

MERLIN H. STARING
JOHN H. WEST, III
Attorneys for Petitioners

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

GEORGE E. TOPPING, JAMES M. BURBAGE, ROBERT A. MILLER AND DENNIS McCABE, Plaintiffs	]	CIVIL ACTION NO. 79-994-N
v.	]	
UNITED STATES OF AMERICA, Defendant	]	

MEMORANDUM ORDER

Background

On November 13, 1977 the Submarine U.S.S. Silversides and the Submarine tender U.S.S. Ortolan proceeded through a marked area in which crab pots and fishing equipment belonging to the fishing vessel REDS RIDER was located, thereby causing the loss of this equipment. Plaintiffs are crewmen aboard the REDS RIDER. They claim the loss of anticipated crew shares as a direct result of the United States' negligent actions. The United States moves for summary judgment on the basis that as a matter of law in the Fourth Circuit, one who unintentionally but negligently damages the property of another is not liable to others who may suffer economic loss because the owner is unable to perform contractual commitments to those others.

Issue

The general rule, enunciated in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, is that a tort to the person or property

of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. At issue here is whether we should recognize an exception to this rule or apply a "special rule" in this case involving fisherman.

Discussion

The rule of *Robins Dry Dock, supra,* continues to be controlling in our Courts. Pursuant to that rule the Fourth Circuit Court of Appeals in *Henderson v. Arundel Corporation,* 384 F.2d 998 (4th Cir. 1976) [sic], summarily affirmed the decision of the District Court, 262 F.Supp. 152 (D.Md. 1966), which held that crew members of a dredge were foreclosed from seeking to recover lost wages from the ship which had collided with the dredge.

In *Henderson, supra,* the Court considered and rejected creating a "special rule" allowing fishermen recovery of loss of prospective wages where there has been a negligent but unintentional interference with their contractual relationship with their employer. Several years later, in a case relied upon by plaintiffs, *Venore Trans. Co. v. M/V STUMA,* 583 F.2d 708 (4th Cir. 1978), the Fourth Circuit once again acknowledged the continued vitality of the rule of *Robins Dry Dock, supra.* The Court distinguished the facts of that case from those in *Robins Dry Dock.* However, in doing so, it noted that *Henderson, supra,* is the type of situation to which the rule is appropriately applied.

Conclusion

Because we find that the facts in the immediate case and the legal questions raised therein bring it within the purview of the rule of *Robins Dry Dock v. Flint, supra,* and *Henderson v. Arundel Corp., supra,* we conclude that as a matter of law plaintiffs are foreclosed from recovery on their claims.

It is ORDERED that defendant United States' motion for summary judgment is GRANTED.

/s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia
July 21, 1980.

APPENDIX B

UNITED STATE COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80-1644

George E. Topping, James M. Burbage, Robert A. Miller, Dennis McCabe,

Appellants,

v.

United States of America,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. McKenzie, Chief Judge.

Argued April 6, 1981 Decided April 15, 1981

Before WINTER, Chief Judge, RUSSELL, Circuit Judge, and ANDERSON,* District Judge.

John H. West, III, Merlin H. Starling (on brief) for Appellant. Justin W. Williams, United States Attorney, Michale A. Rhine, Assistant United States Attorney, Michael Kemmel, Dave Hutchinson, Alice Daniel (Attorney General's Office on brief) for Appellee.

*Hon. G. Ross Anderson, Jr., United States District Judge for the District of South Carolina, sitting by designation.

PER CURIAM:

Plaintiffs, crewmen aboard a commercial fishing vessel, who were compensated by crew shares based on the vessel's earnings, seek to recover their loss of anticipated earnings when fishing gear (i.e., crab pots) owned by the owner of the vessel was destroyed as a result of the negligent operation of the government's submarine and submarine tender, causing a suspension of fishing.

The district court denied recovery on the authority of Robins Dry Dock & Repair Co. V. Flint, 275 U.S. 303 (1927), and Henderson v. Arundel Corp., 384 F.2d 998 (4 Cir. 1967), *aff'g* 262 F. Supp. 152 (D.Md. 1966). We agree with the district court that *Robins Dry Dock* and *Henderson* require dismissal of plaintiff's claims.

AFFIRMED.